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No. 159.

Brf. of Guthrie & Veeder for Appellee.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

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THE STATE OF MINNESOTA,
Appellant,

vs.

C. N. BRUNDAGE.

Appeal from the Circuit Court of the United States for the District of Minnesota.

BRIEF ON BEHALF OF APPELLEE IN SUPPORT OF CONTENTION THAT THE OLEOMARGARINE ACT OF MINNESOTA IS UNCONSTITUTIONAL AS TO INTERSTATE COMMERCE.

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ALBERT H. VEEDER,
Of counsel for appellee.

WASHINGTON, February, 1901.

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STATEMENT OF FACTS.

The question in this case arises under the commerce clause of the Constitution of the United States, and involves the constitutionality of certain provisions contained in the act of the legislature of Minnesota approved April 19, 1899, entitled: "An act to prevent fraud in the sale of dairy products, their imitations or substitutes, to prohibit and prevent the manufacture or sale of unhealthy or adulterated dairy products, and to preserve the public health" (Gen. Laws Minnesota, 1899, ch. 295, pp. 365, 371). Section 16 of that act reads as follows (record p. 49):

> "SEC. 16. No person by himself or his agents or servants shall manufacture for sale, have in his possession with intent to sell, expose or offer for sale, or sell as butter or as cheese, or as substitutes for butter or cheese, or as imitations of butter or cheese, under any name or title whatsoever, any mixture or compound, which is designed to take the

place of butter or of cheese, and which is made from animal or vegetable oils or fats, or by the mixing or compounding of the same, or any mixture or compound consisting in part of butter or of cheese in mixture or combination with animal or vegetable oils or fats, nor shall any person mix, compound with or add to milk, cream, butter or cheese any animal or vegetable oils or fats, with design or intent to make or produce any article or substance in imitation of butter or cheese, nor shall any person coat, powder or color with annatto or with any other coloring matter whatever, butterine or oleomargarine or any mixture or compound of the same, or any article or compound made wholly or in part from animal or vegetable oils or fats not produced from milk or cream, whereby the said article or compound shall be made to resemble butter or cheese, nor shall any person offer or expose for sale or sell any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall have been made, manufactured or produced within this state or in any other state or country; and the having in possession by any person, firm or corporation of any article, substance or compound made, manufactured or produced in violation of the provisions of this section shall be considered as *prima facie* evidence of an intent to sell the same as butter or as cheese contrary to the provisions of this section."

The violation of any of the provisions of this act was made a misdemeanor, punishable by a fine or imprisonment (sec. 30).

It appears from the record that Brundage was arrested upon a warrant issued out of the Municipal Court of the city of Minneapolis, upon the complaint of William C. Corbett, an inspector of the State Dairy and Food Department of the state of Minnesota, which charged that on the 22d day of May, 1899, at the city of Minneapolis, said Brundage wilfully, unlawfully and wrongfully

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offered and exposed for sale, and had in his possession with intent to sell, a quantity of "a certain compound designed to take the place of butter, and made in part from animal and vegetable oil and fats not produced from milk or cream, said compound being an article commonly known as 'oleomargarine,' and being then and there colored with a coloring matter, whereby the said article and compound was made to resemble butter, contrary to the statutes in such case made and provided and against the peace and dignity of the state of Minnesota" (record, p. 1).

On the trial, it was shown that, at the time of the alleged offense, Brundage was the manager at Minneapolis, Minnesota, of the Hammond Packing Company, a corporation having its principal place of business in Chicago, Illinois, and there engaged in the manufacture and sale of oleomargarine, and that, as such manager, he sold to William C. Corbett, an inspector of the State Dairy and Food Department of the state of Minnesota, at the place of business of said Hammond Packing Company in Minneapolis, a ten-pound package of oleomargarine in the form in which it was packed in Hammond, Illinois, by the manufacturer, the G. H. Hammond Company (record, pp. 3-5, 25-26). The article sold was in its original package and was the oleomargarine of commerce known and dealt in as an article of food, and was in the form of package and with the labels required by the act of Congress of August 2, 1886 (c. 840; 24 Stat. 209), entitled "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine" (record, pp. 8-9). The package was exactly the same in size, form and number of pounds of oleomargarine as the package in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1. It appears from the record that all the provisions of the Minnesota

statute in regard to indicating the true character of the article sold, etc., had been complied with, and that the G. H. Hammond Company had paid the special United States tax imposed by the act of Congress, and had complied with all the requirements of that act in respect to the manufacture and sale of oleomargarine, to the character and weight of packages used in interstate commerce and to their labeling or stamping in order to prevent deception. The record further shows that the purchaser asked for oleomargarine, and that the article he received was represented to be oleomargarine (record, pp. 5, 10). There is no feature of deception in the case, and there is absolutely no proof that the oleomargarine in question was unwholesome in the slightest degree, or was sold under circumstances calculated to deceive.

The protection of the Federal Constitution was set up on the trial in the state court (pp. 4, 5), and the judge of that court adjudged after trial that Brundage was "guilty of the alleged offense charged in said complaint, and that he pay a fine of $25, or in default thereof that he be committed for a period of thirty days and confined in said workhouse, which is the common jail of said city of Minneapolis" (p. 2). Brundage refused to pay the fine, and was committed to the jail (p. 2). He then petitioned the Circuit Court of the United States for a writ of *habeas corpus*, alleging, among other things, that his restraint and imprisonment were unauthorized and illegal, because "the said act of the legislature of the State of Minnesota is in violation of Article I., Section 8, of the Constitution of the United States, which provides that 'the Congress shall have power to regulate commerce among the several States'" (p. 3).

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The circuit court, Lochren, J., granted the petition for a writ of *habeas corpus*, on the ground that "the Minnesota act, by its terms, prohibits and attempts to exclude from the state oleomargarine compounded of the very materials, including coloring matters, which are described in the act of Congress of August 2, 1886, (24 Stat. 209)," and that "the conviction and imprisonment of Brundage rest solely upon the invalid portion of the act; that is to say, the portion attempting to exclude oleomargarine from the state" (record, p. 54). The practice in applying for the discharge of the prisoner was the same as that followed in *Minnesota* v. *Barber*, 136 U. S. 313. From the order discharging Brundage from imprisonment, the state has appealed to this court. The following argument is submitted in support of the ruling below.

I.

The fundamental rules which govern the cases constantly arising under the commerce clause of the Constitution of the United States have been elucidated by many cases, and it is unnecessary to enter upon any discussion of the general scope and operation of that clause. The difficulty of the subject no longer springs from any uncertainty as to the principles of constitutional law involved, but from the proper application of those principles to the individual case presented. That the power of Congress to regulate commerce is exclusive, that its silence in respect to any matter of interstate commerce is equivalent to a declaration that it should be absolutely free, and that any legislation by the states interfering with interstate trade in articles of commerce is void, are general propositions which are now well settled. And it is also settled that the legislature of any state may, for the purpose of protecting the community from unwholesome food,

deleterious commodities or fraud and deception, enact such reasonable legislation as it may deem proper and as may be fairly necessary, even though thereby interfering to some extent with interstate commerce. But whenever a state, under its police powers, attempts to interfere with the sale of articles of commerce, it must appear that the legislation in each case is reasonably calculated to protect the health of the people or to prevent fraud and deception. If it appear that the statute as a whole is necessary for the protection of the community, it will be sustained. To that extent may the state legislate upon interstate commerce, and thus incidentally and indirectly regulate it. But it can go no further. "It may not, under the cover of exercising its police powers, substantially prohibit or burden either foreign or interstate commerce."[1]

Examining the facts in the case at bar in the light of these principles, we find that oleomargarine is a recognized subject of commerce, that it is wholesome and nutritious, and that it furnishes a cheap and proper substitute for butter; and we also find that the Minnesota statute of 1899 does not, in the slightest degree, concern inspection or the health of the community. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 14; *Collins* v. *New Hampshire*, 171 U. S. 30, 33. Moreover, it further appears in the record that all the regulations contained in the act of Congress of August 2, 1886, had been complied with. The provisions of that act constitute a complete system for the regulation of interstate traffic and trade in oleomargarine, for the exclusion of deleterious ingredients, and for the prevention of fraud. The object of the

[1] Mr. Justice Strong in *Railroad Co.* v. *Husen*, 95 U. S. 465, 472; see, also, *Minnesota* v. *Barber*, 136 U. S. 313, 320.

act as expressed in its title was not merely to tax, but to regulate, viz. (24 Stat., 209):

> "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine."

And sections 6 and 14 of the act provide:

> "That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. . . .
>
> "The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner of Agriculture; and the decisions of this board shall be final in the premises."

Other sections carefully provide for the enforcement of the provisions of the act, and furnish a complete system for protecting the public in wholesale and retail dealings against fraud and deception, as well as against "ingredients deleterious to the public health." There can be no fraud and no deception in any form if the act of Congress be complied with. To repeat, as, in the case at bar, it was

established that all the requirements of the act of Congress had been complied with, it may be reasonably implied that the oleomargarine did not contain "ingredients deleterious to the public health" in the absence of all proof to the contrary (record, pp.8–9, 28).

II.

The controversy is, therefore, narrowed to the inquiry whether the state statute now before the court was, on the one hand, enacted for the purpose of preventing fraud or deception, or was, on the other hand, really enacted for the purpose of prohibiting and preventing trade in a legitimate article of commerce simply because it has become a suitable substitute for butter and successfully competes with it.

The Minnesota statute declares that the sale of oleomargarine within the borders of that state shall be a criminal offense. It is not an inspection law. The prohibition of sale or keeping for sale is absolute, and does not depend upon the purity or impurity of the article, nor does it necessarily depend upon the use of coloring matter so as to make oleomargarine resemble butter. The statute forbids the sale of oleomargarine in any form, even if free from any coloration or ingredient that causes it to look like butter, so long as it is sold "as a substitute for butter or cheese," which is the sole use to which it is put and for which it is manufactured and sold. One class of property is thus singled out from other property to be destroyed; and one class of business men is thus singled out from others, to be prosecuted as criminals if they attempt to carry on a legitimate trade in a recognized article of interstate commerce.

The governmental power of the states, called the "police power," which extends to the uncompensated de-

struction or impairment of property and business, finds its origin and sole justification in the principle that every person ought to use his property or conduct his business in such a manner as not to injure his neighbors, and in the principle correlative to this, that private interests must be made subservient to the general welfare of the community. Otherwise stated, the police power is founded upon and is solely justified by public necessity, and has, therefore, been styled "the law of overruling necessity." Public necessity, in the sense of that which supplies the reason of the police power, is exactly coextensive with the protection of the public against the wrongful acts of its individual members. In such cases, the exercise of the power is in immediate connection with the protection of persons and property against injurious acts of other persons, and is essentially self-defensive. The acts of protection are sanctioned and supported by the great principle of securing the public safety.

Now, in the case at bar, we are not concerned with police laws which, enacted to promote the general peace and order of society, operate equally upon all property and all persons. The present inquiry concerns the necessity which is to support the validity of a special act—an act which singles out for the purpose of destruction a particular class of property and business or the property or trade of a particular class of persons. Such an act is in its nature exceptional and if it be not sustained by a necessity reasonably commensurate with evils which the public would otherwise suffer, it is arbitrary, that is to say, an act without reason—an exercise of power and not of right. As was said in the opinion of this Court, by Mr. Justice Miller in *Chy Lung* v. *Freeman et al.*, 92 U. S., 275, 280:

"Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."

And in *Mugler* v. *Kansas*, 123 U. S., 623, 661, Mr. Justice Harlan used the following language so often quoted:

"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In *Railroad Co.* v. *Husen*, 95 U. S. 465, 472, Mr. Justice Strong said:

"While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine, and *reasonable* inspection laws, *it may not interfere* with transportation into or through the state, *beyond what is absolutely necessary for its self-protection.* It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

In *Minnesota* v. *Barber*, 136 U. S., 313, 320, Mr. Justice Harlan said:

"Underlying the entire argument in behalf of the state is the proposition, that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. . . . It may be the opinion of some that the presence of disease in animals, at the time

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of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the state to enact. On the contrary, the enactment of a similar statute by each one of the states composing the Union would result in the destruction of commerce among the several states, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease."

And in *Lawton* v. *Steele*, 152 U. S. 133, 137, Mr. Justice Brown said:

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

The necessary and natural operation of the Minnesota statute is an unreasonable discrimination between two legitimate food products—the exclusion of one (oleomargarine) from the markets of the state, and a consequent destruction or impairment of its value, to the end that the other (butter) may advance in value, by virtue of the monopoly thus granted, far beyond the price which would follow honest competition. Let us suppose that, in a state where the dairy interests were not in a majority and therefore dominant, a statute should be passed restricting

or prohibiting the sale of butter, because the local industry in oleomargarine would thus be benefited. Would such an act stand? Suppose, also, by way of illustration, that a state whose soil was adapted to the growth of wheat but not of corn should, in order to protect its wheat growers, enact that, because corn is largely used in the manufacture of bogus and adulterated sugar, the sale of corn as an article of food be prohibited; or that Vermont, in order to protect its maple-sugar crop, should prohibit the sale of all sorghum sugar; or that Pennsylvania should prohibit the sale of bran flour because it is used to adulterate mustard; or that West Virginia should prohibit the sale of all anthracite coal "designed to take the place of bituminous coal as an article of fuel"; or that Louisiana should prohibit the use of beet sugar or glucose or saccharine because these may be used as substitutes for the local product of cane sugar. Can it be supposed for a moment that such prohibitions would be upheld in so far as they related to the sale of articles of interstate commerce?

The police power of a state can, of course, be exerted to prevent deception and fraud; but the utmost extent to which deception may reach in some cases can never justify the prohibition of an article not at all injurious or deceptive. This act prohibits sales of an article not calculated or intended to deceive, manufactured with precautions and methods which now insure its wholesomeness and under the supervision of federal officers whose duty it is to prevent deleterious ingredients, and sold under regulations which absolutely preclude the idea of deception in the sale. In the case at bar the state officer who sought to trap Brundage *actually asked for oleomargarine and got what he*

asked for in an original package of interstate commerce (record, pp. 5, 10). If any one is deceived by oleomargarine into eating it for butter, neither the manufacturer nor the dealer, wholesale or retail, is at fault (see sec. 20 of the Minnesota act). No fraud has been perpetrated and no injury has been done. The ordinary person will have knowledge, as of notorious facts, that oleomargarine is wholesome and nutritious, and is designed to take the place of butter because in its natural form it is a legitimate and desirable substitute for butter in the opinion of those who cannot afford the more expensive article, that it is used as such all over the world, that it is an important subject of traffic and of interstate and foreign commerce, and that the federal government derives a large annual revenue from the taxation of this article, the regulation of its manufacture and the licensing of those engaged in the business. If any person having such knowledge—and every person is charged with it—prefers oleomargarine to butter, he should be at liberty to make the choice; and, if he be too poor to buy good butter, he should be at liberty to procure at low prices good oleomargarine, which is a wholesome and palatable substitute for butter. Can it be said that, in order to protect the dairy interests of a state, the right to buy oleomargarine may be denied to those who prefer oleomargarine or who are too poor to buy butter, and that, in order to promote a virtual monopoly in an article of food, the property of those who would encroach upon that monopoly by selling a cheaper substitute may be destroyed, or, to put it in other words, that, in order to protect the business and products of one state, the business and products of another state may be excluded?

III.

The Attorney-General of Minnesota apparently recognizes the weakness of the act in question, as constituting a prohibition and not a regulation, for he attempts to divide section 16 of the act of 1899 into two parts or subdivisions. Under the first head or subdivision, he would place the provision that oleomargarine or any *substitute* for butter shall not be manufactured or sold or offered for sale, which is clearly an absolute prohibition, irrespective of coloring matter; and under the second head, the provision that oleomargarine shall not be sold when colored to resemble butter. The former subdivision, he argues, may be upheld by assuming that it was only intended to apply to manufacture and sale wholly within the state, and the latter by assuming that it alone was intended to apply to interstate commerce. The object of this separation of the act is, if possible, to sustain the legislation, in respect of the first subdivision, by the authority of *Powell* v. *Pennsylvania*, 127 U. S., 678, and, in respect of the second subdivision, by the authority of *Plumley* v. *Massachusetts*, 155 U. S. 461.

In order to sustain these contentions, it is necessary to insert in the statute language which the legislature did not see fit to employ, and probably deliberately omitted; and it is necessary likewise wholly to disregard the language which follows in the same section both of these so-called separable clauses, and which renders it perfectly clear that the intention was to apply the whole section to interstate commerce, and to prohibit all dealings in oleomargarine. The language to which we refer is at the close of section 16, as follows:

> "Nor shall any person offer or expose for sale or sell any article, substance or compound made, manu-

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factured or produced in violation of the provisions of this section, *whether such article, substance or compound shall have been made, manufactured or produced within this state or in any other state or country;* and the having in possession by any person, firm or corporation of any article, substance or compound made, manufactured or produced in violation of the provisions of this section shall be considered as *prima facie* evidence of an intent to sell the same as butter or as cheese contrary to the provisions of this section."

Section 16 of the act of 1899 was clearly intended to operate as a whole, and now to limit one portion to local manufacture and trade, and another portion to interstate commerce, obviously "would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact."[1] Moreover, the language of the complaint clearly shows that it was drawn with reference to the act as a whole, and not with reference to any specific part (records, p. 1).

Taking the act as a whole, can there be any doubt either as to its object or as to its effect? The object was to prohibit the sale of oleomargarine within the state; and the provisions of the act compass that object. The test is whether Brundage could comply with the law and sell oleomargarine, colored or uncolored, pure or impure. We submit that he could not.

The case of *Powell* v. *Pennsylvania*, 127 U. S., 678, 684 (decided in April, 1888), is distinguished from the case at bar not only upon the ground that it had relation solely to internal trade and traffic, but also for the reason that the basis of the decision was the assumption of fact "under the circumstances disclosed in the record" that "most kinds of oleomargarine butter in the market

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1 *Poindexter* v. *Greenhow*, 114 U. S. 270, 305.

contain ingredients that are or may become injurious to health." There is no proof whatever of this fact in the case at bar, and the progress in science and manufacture has made it impossible that any such fact should be true at the present time (*Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 9, 15). Moreover, the act of Congress has made it the duty of government officials to prevent deleterious ingredients (c. 840, sec. 14; 24 Stat. 212).

The case of *Plumley* v. *Massachusetts*, 155 U. S. 461, is likewise distinguishable not only on the facts, but on the statute. A simple comparison of the Massachusetts act with the Minnesota act now before the court will at once show the substantial difference between the two statutes. The Massachusetts act showed on its face that the only purpose of the legislation was to prevent fraudulent "*imitation* of yellow butter." And as Mr. Justice Harlan stated, in the opinion of the court (at p. 461), the act "does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure, unadulterated milk or cream of such milk. If free from coloration or ingredient that 'causes it to look like butter,' the right to sell it 'in a separate and distinct form, and in such manner as will advise the consumer of its real character,' is neither restricted nor prohibited."[1]

Now, these remarks contain the essence of the decision in the *Plumley* case and point the very distinction between that case and such cases as the *Schollenberger* and *Collins* cases and the case at bar. The Minnesota act does prohibit and was intended to prohibit the sale of all oleomargarine, no matter where manufactured. The Massa-

[1] See also Mr. Justice Peckham's remarks on the *Plumley* case in *Schollenberger* v. *Pennsylvania*, 171 U. S., at p. 17.

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chusetts statute under consideration in the *Plumley* case contained the express proviso:

> "*Provided*, that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter" (Mass. Stats., 1891, ch. 58, p. 695; Supp. 1889–1895, p. 396).

This proviso, to which the utmost importance was attached by this court, is utterly lacking from the Minnesota statute now before the court. Yet, notwithstanding this omission, the contention on behalf of the state is that the act should nevertheless be read as if it in fact did contain the Massachusetts proviso.

Although it is not urged that the *Schollenberger* and *Collins* cases actually overruled the *Plumley* case, it is submitted that the language of the latter cases most persuasively shows that the court will confine the doctrine of the *Plumley* case to the facts appearing in that case and will not extend it to other cases where the vital and essential features of the proviso of the Massachusetts statute will not be found.

The Minnesota legislature in 1899 may reasonably be presumed to have had the Massachusetts statute in mind. The Minnesota act of 1899 was enacted because the legislation then existing, known as the "pink" law, was void because in conflict with the recent decision of this court in *Collins* v. *New Hampshire*, 171 U. S. 30.[1] At the time the act of 1899 was passed, nineteen states were, and are now, regulating the manufacture and sale of oleomargarine under the provisions of the Massachusetts statute, which had been upheld by this court, and is now in

[1] *Armour Packing Co.* v. *Snyder*, 84 Fed. Rep. 136, 138.

satisfactory operation in those nineteen states.[1] The Minnesota legislature did not adopt the form of the Massachusetts statute because it was not prohibitory.

It is, of course, quite evident why the Massachusetts proviso or its substance was not inserted in the Minnesota statute. It would have clashed with what preceded and would have nullified what was expressed and intended. The declared purpose of the section, if we understand the meaning of language, was to prohibit the manufacture or sale, not merely of an imitation of butter or cheese, but of any "substitute for butter or cheese," whether or not colored to imitate or resemble butter. In view of this, what sheer absurdity it would have been to add the Massachussetts proviso which we have quoted above. The first portion of section 16 of the act now before the court could not possibly stand with any such proviso.

It is, therefore, submitted that in determining the validity of this statute, the saving proviso in the *Plumley* case cannot be implied or read into the Minnesota statute, and that it follows that the act now in question is not at all analogous to the Massachusetts statute which was sustained by this court.

IV.

As to the contention that the act may be separated and the absolute prohibition of manufacture or sale of any *substitute* for butter held constitutional as to local or domestic manufacture and sale, and the inhibition of the use of coloring compounds alone held to apply to interstate commerce, the sufficient answer must be that the language used by the legislature utterly fails to indicate the intention to create or draw any such distinction.

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[1] See Appendix.

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To insert limiting provisions into this act, in the first place limiting the prohibitory feature to local manufacture and sale, and, in the second place, implying in respect of interstate commerce the proviso of the Massachussetts statute, would be to make a new law, which is not within the judicial province. A court cannot, for the purpose of making an act valid, put words into it or imply limitations which the legislature has omitted—and presumably with design. Such a form of judicial construction would be nothing less than judicial legislation; it would be making the law and not declaring it; it would be amending the law and not construing it.

In *United States* v. *Reese et al.*, 92 U. S. 214, 221, an act of Congress, passed May 31, 1870 (16 Stat., 140), provided for the punishment of election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. The court was of opinion that Congress had constitutional power to punish such denial only when it was on account of race, color or previous condition of servitude. It was urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was, in fact, the cause of denial. But the court said through Chief Justice Waite:

> "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so

as to make it specific, when, as expressed, it is general only. . . . *To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.*"

In the *Trade-Mark Cases*, 100 U. S. 82, 98, 99, an act of Congress provided for the registration of trade-marks generally without limiting their use to commerce between the states or with foreign countries. The defendants were indicted for violating the provisions of this act. It was suggested that if Congress had power to regulate trade-marks used in commerce with foreign nations and among the several states, the statute should be held valid in that class of cases, if no further. The court (Miller, J.) said:

"While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body" (p. 98). . . . "*If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation,* and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law." (p. 99).

The act was, therefore, held to be wholly unconstitutional.

In *Tiernan* v. *Rinker*, 102 U. S. 123, a statute of Texas provided that a license fee should be paid by those selling wines except those grown in the state.

The court (Field, J.) held that it was not competent to distinguish against wines grown elsewhere, that the court could not impose the tax upon domestic wines because the legislature had made no such enactment, and that the effect of their exception was, therefore, to relieve all wines from taxation.

In *Allen* v. *Louisiana*, 103 U. S. 80, 83, the constitution of Missouri provided that a city might subscribe in aid of a railroad in case the general assembly granted authority for that purpose upon the assent of two-thirds of the qualified voters. An act was passed by the general assembly authorizing the city of Louisiana to subscribe to the capital stock of a railroad company upon the assent of a majority of the resident taxpayers. It was held that the court could not strike out this limitation and insert the limitation required by the constitution. The court said (Waite, C. J.):

> "It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. 'But,' as was said by Chief Justice Shaw, in *Warren* v. *Mayor and Aldermen of Charlestown*, 2 Gray (Mass.), 84, 'if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.' The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature" (p. 83). "In the construction of

a statute, every word is, if possible, to be given some effect. Nothing is to be stricken out if it can be avoided. It is not to be presumed that the legislature intended any part to be without meaning" (p. 84).

In *Poindexter* v. *Greenhow*, 114 U. S. 270, 304, certain bonds of the state of Virginia had been issued under an act providing that the coupons thereon should be receivable at and after maturity for all taxes due the state. Thereafter the legislature passed an act requiring tax collectors to receive in discharge of taxes gold, silver, treasury notes, national bank currency and nothing else, and forbidding the receipt of coupons issued under the foregoing act in payment therefor. The latter act also abolished the actions of trespass, and trespass on the case, and other particular forms of action as remedies for the taxpayer, who had tendered his coupons in payment of taxes. The court held that the provisions of the act providing that the coupons should be receivable in payment of taxes constituted a contract, and that the act providing that they should not be so receivable was unconstitutional as it impaired the obligation of that contract. It held also that those parts of the latter act abolishing the remedies of the taxpayer were not separable from the remainder of the act, inasmuch as they all constituted part of one plan, and that the entire act was, therefore, unconstitutional. Matthews, J., said:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. *To hold otherwise would be to substitute for the law*

intended by the legislature one they may never have been willing by itself to enact."

In *Spraigue* v. *Thompson*, 118 U. S. 90, 95, a statute of Georgia provided that any master of a vessel bearing toward any of the ports of the state, except coasters in the state, and between the ports of the state and those of South Carolina or of Florida, who refused to receive a pilot on board, should be liable, on his arrival in such port of the state, to pay the first pilot who might have offered his services outside the bar the full rates of pilotage established by law. It was held that this provision was unlawful by reason of the fact that it discriminated in rates between the ports of different states. It was urged that the illegal exceptions might be disregarded so that the rest of the section could stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. The court said (Matthews, J.):

"The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. *It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions.*"

In *Baldwin* v. *Franks*, 120 U. S. 678, 685, a statute provided for the punishment of those who in any state or territory conspired for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws. It had previously been held that this statute was unconstitutional in so far as it applied to conspiracies to deprive persons of the equal

protection of the laws of the state, no special rights or privileges arising under the constitution, laws or treaties of the United States being involved. It was contended that, while this was the fact, still the statute was effectual so far as concerned conspiracies to deprive aliens of the rights guaranteed to them in a state by the treaties of the United States. The court said (Waite, C. J.):

> "In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. . . . It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

In *California* v. *Central Pacific Railroad Co.*, 127 U. S. 1. 45, it appeared that by the constitution of California two modes of assessment for taxation were prescribed: one by a state board of equalization, the other by county boards and local assessors. All property was directed to be assessed in the municipality in which it was situated,

except that the franchise, roadway, roadbed, rails and rolling stock of any railroad operated in more than one county were to be assessed by the state board, and apportioned to the several municipalities. By an act of the legislature, the state board was required to include in their assessment steamers engaged in transporting passengers and freights across waters which divided a railroad. This act had been held by the Supreme Court of California to be contrary to the constitution, and steamboats were held to be assessable by the county board, and not by the state board. The state board had made one assessment upon all the above-described property of the defendant, including such steamers and including also franchises granted by the United States. It was held by this court that the statute was unconstitutional in attempting to authorize an assessment in both of these respects; that the values of these steamers and franchises were so blended with the other items of which the assessment was composed that they could not be separated therefrom, and that the assessments were void. To the same effect is *Santa Clara Co.* v. *South. Pac. Railroad*, 118 U. S. 394.

In *Leloup* v. *Mobile*, 127 U. S. 640, 647, a state statute imposed a general license tax upon a telegraph company. It was held that this affected the entire business, interstate as well as domestic or internal, and was unconstitutional in its entirety. The court said (Bradley, J.):

> "It is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if

> not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

The subject was again reviewed by Mr. Chief Justice Fuller in *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 635, 636, where the above cases of *Poindexter* v. *Greenhow* and *Spraigue* v. *Thompson* were particularly cited with approval.

Conclusion.

It is submitted, therefore, that the statute of Minnesota now before the court should be declared unconstitutional, in so far as it affects interstate commerce, because its provisions conflict with the exclusive power of Congress to regulate commerce among the states and deny that freedom of commercial intercourse which it was the purpose of the framers of the Federal Constitution, above all other considerations, to secure to the people of the United States, and that the order of the Circuit Court should be affirmed.

Washington, February, 1901.

William D. Guthrie,
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APPENDIX.

STATE STATUTES IN FORCE REGULATING MANUFACTURE AND SALE OF OLEOMARGARINE.

The proviso of the Massachusetts statute under consideration in the *Plumley* case reads as follows:

"*Provided*, That nothing in this act shall be construed to prohibit the *manufacture or sale of oleomargarine* in a separate and distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." (Mass. Stats. 1891, ch. 58, p. 695; Supp. to Pub. Stats., 1889–1895, p. 396.)

This proviso is retained in the latest act (Stat. 1894, ch. 280, p. 1009).

It has been, in substance, incorporated in the law of nineteen other states:

Alabama, Acts, 1894–5, p. 777. *California*, Penal Code, 1899, p. 517, 586. *Colorado*, Laws, 1895, ch. 19, p. 57. *Connecticut*, Pub. Laws, 1893, ch. 114, p. 264. *Delaware*, Laws, 1895, ch. 209, p. 274. *Georgia*, Laws, 1895, pt. 1, tit. 7, p. 67. *Idaho*, Laws, 1899, p. 548. *Maryland*, Laws, 1900, p. 791. *Michigan*, Pub. Acts, 1899, p. 218. *Missouri*, Laws, 1895, p. 26. *Nebraska*, Comp. Stats., 1895, pp. 1355–1357. *New Hampshire*, Laws, 1895, ch. 115, p. 477. *New Jersey*, Laws, 1895, ch. 332, p. 658. *Ohio*, Rev. Stat., 1899, vol. 2, tit. 5, ch. A, p. 2338. *South Carolina*, Laws, 1896, No. 96, p. 215. *Tennessee*, Anno. Code, 1896, ch. 16, p. 793. *Utah*, Rev. Stat., 1898, tit. 15, p. 242. *Washington*, Anno. Code, 1897, vol. 1, ch. 2, sec. 2846. *Wisconsin*, Laws, 1895, ch. 30, p. 77.

Eighteen other states provide for labeling, forbid artificial coloring, and the like, and otherwise allow unrestricted manufacture and sale:

Arkansas, Dig. of Stats., 1894, ch. 48, p. 522. *Florida*, Rev. Stat., 1891, ch. 8, p. 831. *Illinois*, Laws, 1897, p. 151. *Indiana*, Rev. Stat., 1897, sec. 2191, p. 351. *Iowa*, Anno. Code, 1897, secs. 2516-2518, p. 880. *Kentucky*, Laws, 1893, ch. 182, p. 794. *Louisiana*, Rev. Laws, 1897, p. 752. *Mississippi*, Anno. Code, 1892, sec. 1242, p. 365. *Montana*, Stats., 1895, tit. 10, p. 1078. *Nevada*, Gen. Stat., 1885, sec. 4810, p. 1069. *New York*, Rev. Stats., 1896, p. 40. *North Carolina*, Pub. Laws, 1895, ch. 106, p. 105. *North Dakota*, Laws, 1899, p. 91. *Oregon*, Anno. Laws, 1892, ch. 36, p. 1468; Laws, 1893, p. 102. *Pennsylvania*, Laws, 1899, p. 241. *Rhode Island*, Gen. Laws, 1896, ch. 146, p. 451. *Texas*, Rev. Stat., 1895, Penal Code, tit. 12, ch. 2. *Virginia*, Acts, 1899-1900, p. 1006.

In three states sales are forbidden unless the article has been artificially colored pink:

South Dakota, Sess. Laws, 1897, ch. 65, p. 183. *Vermont*, Stats., 1894, secs. 4334-4336, Laws 1890, No. 53, p. 63. *West Virginia*, Code, 1891, p. 1046, Acts, 1891, ch. 8, p. 12.

These three statutes are probably invalid under the decision in *Collins* v. *New Hampshire*, 171 U. S. 30, but they still appear on the statute books.